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UNITED STATES BANKRUPTCY COURT

EASTERN DISTRICT OF NEW YORK

Case No. 11-42390-nhl

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In the Matter of:

IMAGE RENT A CAR, INC.,

Debtor.

- - - - -x

United States Bankruptcy Court

271 Cadman Plaza East

Brooklyn, New York

April 10, 2012

11:39 AM

B E F O R E:

HON. NANCY H. LORD

U.S. BANKRUPTCY JUDGE

Matter: [55] Notice of Hearing on Debtor's Objection to the  
Application to Employ Daniel Gershburg, Esq., P.C. as Special  
Counsel to the Trustee (RE: related document(s) [49]  
Application to Employ filed by Trustee Gregory Messer, [51]  
Objection filed by Debtor Image Rent A Car, Inc., [52] Exhibit,  
[53] Exhibit)

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A P P E A R A N C E S :

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BY: GARY F. HERBST, ESQ.

IMAGE RENT A CAR, INC.  
P R O C E E D I N G S

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THE CLERK: Matter number 13 in the case of Image Rent  
A Car, Inc.

THE COURT: Good morning. Please state your  
appearances.

MR. HERBST: Yes, Your Honor, Gary Herbst from  
Lamonica Herbst & Maniscalco on behalf of the Chapter 7  
trustee, Gregory Messer.

MR. BALISOK: Good morning, Your Honor, Joseph --

THE COURT: I need -- I want you, Mr. Herbst, step  
away. We can't pick you up as well unless you're at the  
podium.

MR. BALISOK: Good morning, Your Honor. My name is  
Joseph Balisok, and I represent the debtor, Image Rent A Car.

MR. GERSHBURG: Good morning, Your Honor, Daniel  
Gershburt. I represent creditor Digby Adler Group, and I'm a  
proposed special counsel to the trustee.

THE COURT: Mr. Herbst, to your motion

MR. HERBST: Thank you, Your Honor. Your Honor, this  
is the trustee's application to retain Mr. Gershburt as special  
counsel to the trustee and the estate and to pursue whatever  
claims that we think are appropriate to be pursued in  
connection with this matter. The trustee -- just as a little  
bit of background, Mr. Gershburt represents Digby, who  
represents 300,000 on 304,000 dollars of claims in this estate,

IMAGE RENT A CAR, INC.

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1 little over ninety-eight percent of the debt in the case.

2 THE COURT: Does that arise out of the cause of action  
3 in California?

4 MR. HERBST: That's correct.

5 THE COURT: So presumably, that's a disputed claim?

6 MR. HERBST: Presumably.

7 THE COURT: Okay.

8 MR. HERBST: But they represent at this point in time  
9 the largest debt of the case. And there has not been an  
10 objection filed by the trustee or certainly any other party.

11 The trustee initially met as well as I did with the  
12 debtor's counsel and its principal. And from that, I don't  
13 know what has been said in the courts before, but I'll make it  
14 very clear: it was less than clear about what had transpired  
15 here, who the principal of the debtor was. There was a lot of  
16 confusion with regard to that.

17 The trustee was poised to go do his own 2004  
18 examinations when we had learned that the 2004 examinations  
19 were being sought by Digby, and we were essentially  
20 piggybacking those behind the scenes. Since it appeared that  
21 they were going to be the largest creditor, it made sense to  
22 not start to incur duplicate efforts and time in this matter  
23 where counsel had already been pursuing this matter pre-  
24 petition and had learned a tremendous amount of corporate  
25 information that the trustee and the estate did not have. We

**IMAGE RENT A CAR, INC.**

1 had been in contact with counsel throughout the proceedings as  
2 to what they had learned, what they've -- and what information  
3 they had, and it came to the point where it appears that these  
4 claims may be ripe for prosecution or pursuit at this point in  
5 time. And thus, the trustee --

6 THE COURT: What claims?

7 MR. HERBST: Claims of potential fraudulent  
8 conveyances and diversion of assets of the estate, those type  
9 of claims.

10 THE COURT: Claims having nothing to do with  
11 California's action --

12 MR. HERBST: Nothing to do --

13 THE COURT: -- which was an action --

14 MR. HERBST: -- with California action.

15 THE COURT: -- between a creditor and the debtor which  
16 was stayed.

17 MR. HERBST: That's correct. And those are the types  
18 of things that they were uncovering, types of information that  
19 they were uncovering throughout their investigation and  
20 continuing on through the bankruptcy process as to what  
21 happened to the estate's assets.

22 The trustee at no time opined or said that it was  
23 satisfied and that it had no further interest in pursuing this  
24 types of claims in this case. I understand it may have been  
25 represented to your predecessor that that was the case, but

**IMAGE RENT A CAR, INC.**

1 that's not what the trustee's position was. Now, the trustee  
2 is faced with the idea of my firm doing this as general  
3 counsel, or retaining the firm that has the most corporate  
4 knowledge and avoiding a lot of duplication of effort; and  
5 also, quite candidly, at a reduced rate from what I would be  
6 charging; almost half -- about half of what the rate would be  
7 that my firm would charge in connection with this case. The  
8 primary beneficiary of any recovery if there were recovery  
9 would be Digby. So it seemed to make a lot of logical sense  
10 from a cost standpoint, from a avoiding of duplication effort,  
11 and also from the interest of the parties that are aligned at  
12 this point in time, the estate and Digby in recovery.

13 Now, the trustee received an objection filed  
14 curiously, I guess, by the debtor. Now, I guess objections  
15 could be filed by the debtor, but it would seem more pointed if  
16 it was filed by principals of the debtor or parties that might  
17 be the target of the pursuit of claims. But the debtor's  
18 interests are effectively represented by the trustee. It's not  
19 an individual type case; it's a corporate case. So the  
20 corporate entity is effectively represented by the trustee.  
21 I'm not saying they don't have standing to file it, but it's  
22 the question of really whether the debtor should be --

23 THE COURT: It's a question of what exists after a  
24 Chapter 7 in a corporation. It's usually it's a dead entity  
25 because in a --

## IMAGE RENT A CAR, INC.

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1 MR. HERBST: correct.

2 THE COURT: -- corporate 7 there's really nothing  
3 for -- to be done. I mean there were some judges who wouldn't  
4 even hear a Chapter 7 debtor corporate attorney who I over the  
5 years appeared before. I took that position that it really is  
6 an entity that doesn't exist for purposes of taking those kinds  
7 of positions, but --

8 MR. HERBST: And if anything, more often than not,  
9 when I am faced with these kinds of situations, I usually have  
10 an aligned interest with the debtor's counsel, saying, you  
11 know, if you recover assets, marvelous; if you don't, you  
12 don't. But they usually don't have an opposition to the  
13 trustee seeking to recover.

14 THE COURT: But also, Mr. Herbst, generally speaking,  
15 though, a special counsel retention once the trustee has  
16 general counsel is usually for a very specific kind of thing as  
17 opposed to in this case you're really looking for the special  
18 counsel to do the job that the general counsel would do with  
19 respect to examining as far as avoidance actions.

20 MR. HERBST: Yes and no. You're right, Your Honor, in  
21 the context of the case where you have a lot of assets and a  
22 lot of issues and you have one focus, which is a limited focus  
23 of only one cause of action that might be pursued. Here there  
24 really is very limited issues other than, essentially, the  
25 action that would be pursued that the creditor here had already



## IMAGE RENT A CAR, INC.

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1 been investigating and is -- would be representing the estate's  
2 interest. But it's primarily, as they say, a recognition that  
3 Digby as the ninety-eight-point-whatever-percent creditor here  
4 would have not only the aligned interest but is their -- as  
5 Judge Leifman used to say to me, it's their ox that's being  
6 gored. So they are the primary parties that will reap the  
7 benefits or lack thereof if counsel, special counsel was  
8 retained.

9 THE COURT: Do you know whether Mr. -- do you know  
10 whether Digby has released Mr. Gershburg as his counsel?

11 MR. HERBST: I have advised Mr. Gershburg that if they  
12 are retained by the estate, the master in this case is the  
13 trustee. The trustee will dictate all terms. Now, I don't  
14 know if they have retained separate counsel because I don't  
15 know that separate counsel -- Digby needs separate counsel  
16 beyond this point except to the extent that a claims objection  
17 might be pursued. But absent --

18 THE COURT: My question was not that; my question was  
19 whether they released them or not. I under -- you know,  
20 because to understand that somebody has one master, if they  
21 still got two clients, that could be problematic from an  
22 ethical point of view.

23 MR. HERBST: I -- Your Honor, I don't know if that had  
24 been clearly spelled out by Mr. Gershburg, but I have more  
25 than -- I have no problem Mr. Gershburg addressing that issue

**IMAGE RENT A CAR, INC.**

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1 and making sure it would be clear that the party, the sole  
2 party would be the trustee. And I don't think that Mr.  
3 Gershburt or his client would have any opposition to that, but  
4 I will leave that to him to represent that to the Court.

5 There were also some allegations in reading the  
6 opposition that there had been some discourteous behavior. I  
7 will assume the Court that to the extent necessary that I need  
8 to appear at any deposition as well, I will be glad to do that,  
9 but there will not be any conduct that would be anything but  
10 proper before the Court and proper in a deposition. I had been  
11 assured by Mr. Gershburt that that did not happen.

12 I know there's a dispute between the parties. But  
13 just to make it clear: there will be no -- nothing other than  
14 a proper way to proceed before this Court and in any  
15 deposition. So to the extent that that was unclear or that  
16 there's any ambiguity, I'll nip that in the bud for the Court.

17 There really is no, in our position, basis to  
18 challenge the retention of special counsel. It's the trustee  
19 in his business judgment believing it's proper; it is allowable  
20 under the code. The conflict of interest that might be an  
21 issue I don't believe exists for the purposes of retention  
22 under 327, and I think the case law is quite clear. The only  
23 basis that's being asserted is the fact that they were a  
24 creditor of the estate for Mr. Gershburt. But Your Honor's  
25 question, I think, is a fair one, which is, are they going to

## IMAGE RENT A CAR, INC.

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1 release them so that issue is essentially avoided -- I think  
2 would avoid that issue. Unless Your Honor has any other  
3 questions for me, I'll be glad to address them or to Mr.  
4 Gershburg?

5 THE COURT: Let me hear -- well, let me -- again,  
6 understanding that I'm not quite sure what role a Chapter 7  
7 debtor's lawyer, corporate debtor's lawyer has here, I'm going  
8 to hear Mr. Balisok. I don't know how much weight I'm going to  
9 give to the argument based upon that, but I'm going to hear  
10 you. So let me hear Mr. Balisok, and then I'll get back --

11 MR. HERBST: Thank you, Your Honor.

12 THE COURT: -- to you if I have any other questions.

13 MR. BALISOK: Thank you, Your Honor. There's two  
14 reasons why the -- mainly, why the debtor is objecting to the  
15 appointment of Mr. Gershburg as attorney for the trustee. The  
16 first one is the current conflict of interest. Mr. Herbst has  
17 represented to this Court that there hasn't been any objection  
18 to the alleged debt of Mr. -- of Digby Adler Group, LLC, and  
19 that couldn't be more incorrect, Your Honor. At the 2004  
20 meeting, Mr. Zilberman, representative of the debtor, expressly  
21 stated this was a case of corporate terrorism and that he  
22 believed that there was a frivolous claim brought against him.

23 THE COURT: I think what Mr. Herbst said is that  
24 there's been no objection filed by the trustee -- it's the  
25 trustee -- this is -- a Chapter 7 is the trustee drives the

IMAGE RENT A CAR, INC.

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1 truck. So --

2 MR. HERBST: That's right, Your Honor.

3 THE COURT: -- claims are filed, and it's for the  
4 trustee to object to them or not. And I think since the  
5 trustee is the only one who can object to claims when he was  
6 saying there was no objection, I think he meant that the  
7 trustee has not objected to claims.

8 MR. HERBST: So --

9 THE COURT: Is that correct?

10 MR. HERBST: That's correct, Your Honor. But also,  
11 just to also make it clear, the debtor technically could  
12 file -- the debtor or some other party could file a claims  
13 objection although the trustee is primarily given that role.  
14 No -- all I was saying is no party has filed any claim any --

15 THE COURT: Okay.

16 MR. HERBST: -- objection to claim of record, and  
17 therefore the claim is allowed as filed.

18 THE COURT: Right.

19 MR. BALISOK: We have filed an objection to claim of  
20 record. We did it when we filed the motion to quash the 2004  
21 motion made by Mr. Gershburg. We represented to the Court that  
22 it was a frivolous claim, Your Honor. This 300,000 dollars is  
23 a disputed matter. In fact, Your Honor, we believe --

24 THE COURT: Yeah, I understand that it's disputed.

25 MR. BALISOK: So --

**IMAGE RENT A CAR, INC.**

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1 THE COURT: But you were litigating in California.

2 MR. BALISOK: Right.

3 THE COURT: I understand that.

4 MR. BALISOK: Which bring --

5 THE COURT: But I think when we're talking about a  
6 claims objection, we're talking about a formal claims objection  
7 to a particular claim filed. And I think that -- I understand  
8 that in various papers, you have made it -- you have made it  
9 known on behalf of your client that you don't agree that this  
10 amount is owed. I understand.

11 MR. BALISOK: Also, it's extremely critical, Your  
12 Honor, for the next point, and that is there's an asset  
13 currently of the estate that the trustee has an obligation to  
14 pursue, Your Honor; and that is that Digby Adler Group, LLC  
15 pursued a frivolous claim. And I've spoken to tort attorneys,  
16 and they've told me that the possible damages in a claim when  
17 you prove that there has been a frivolous claim and perhaps  
18 malicious prosecution -- I'm not a tort attorney, Your Honor,  
19 but there are many claims under with which you can pursue, the  
20 trustee has the ability to pursue against Digby Adler Group.  
21 And this could actually result in a huge amount of assets being  
22 obtained by the estate.

23 And Your Honor, the only reason, as I mentioned and  
24 Mr. Herbst so kindly noted in my motion to oppose Digby Adler's  
25 2004 motion, Your Honor, this asset of the estate belongs to

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1 the shareholders, Your Honor. This asset of the estate would  
2 be left over after you prove that Digby Adler Group's claim was  
3 clearly frivolous. It would knock out the 300,000 dollar claim  
4 they made. The funds to those people who have claims on what's  
5 called the debt would be paid, and the remaining funds,  
6 obviously, the trustee would get a percentage for  
7 administering. But Your Honor, it would go to the  
8 shareholders. So we have a learn, clear case where Digby Adler  
9 Group is directly, you know --

10 THE COURT: Well, except if you feel that that is an  
11 asset of the estate --

12 MR. BALISOK: And we have stated as such.

13 THE COURT: -- now again, we're not talking about  
14 actions that are in the bankruptcy, okay. In other words,  
15 if --

16 MR. BALISOK: This is an asset to the estate, Your  
17 Honor. Digby Adler Group sued and caused -- in a tortious  
18 action cause Image Rent A Car to actually --

19 THE COURT: Trustee's.

20 MR. BALISOK: -- go bankrupt. Your Honor, this,  
21 according to all tort attorneys I've spoken to, could result in  
22 a significant claim, and this is a distinct, actionable cause  
23 of action owned currently by the trustee, Your Honor. And  
24 Digby Adler Group, who clearly has an adverse interest to the  
25 trustee, for the trustee has an obligation to pursue all causes

IMAGE RENT A CAR, INC.

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1 of action, including those actions --

2 THE COURT: Here's the thing: Mr. Messer is the  
3 trustee, and Mr. Herbst's firm has been retained to represent  
4 the trustee.

5 MR. BALISOK: Yes, Your Honor.

6 THE COURT: The trustee is now through Mr. Herbst's  
7 firm seeking to retain special counsel. If you have -- if you  
8 you believe that you have an asset that should be investigated  
9 by Mr. Messer --

10 MR. BALISOK: Yes, Your Honor

11 THE COURT: -- okay, you -- I think that that prevents  
12 you from contacting Mr. Messer --

13 MR. BALISOK: We did, Your Honor.

14 THE COURT: -- or giving him that material.

15 MR. BALISOK: We did, Your Honor

16 THE COURT: And presumably, if he feels that this is  
17 worth pursuing, he has the ability to use Mr. Herbst's firm.

18 MR. BALISOK: But this is all premature, these  
19 requests, Your Honor.

20 THE COURT: Well, he has the ability to use Mr.  
21 Herbst's firm. It's a different asset. If --

22 MR. BALISOK: But he hasn't even looked into it, Your  
23 Honor.

24 THE COURT: Well, that's a different issue.

25 MR. BALISOK: Right, so the question now --

## IMAGE RENT A CAR, INC.

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1 THE COURT: Okay. If you -- that's a different issue.  
2 Again, if you have an asset to present to Mr. Messer, you  
3 should present it to Mr. Messer. And again, if Mr. Messer  
4 wants to pursue it in that case, I believe, he would not be  
5 able to use Mr. Gershburg; he would be able to use Mr. Herbst's  
6 firm in determining whether or not litigation should be  
7 brought. But that's -- that is a --

8 MR. BALISOK: We've --

9 THE COURT: -- different asset. That's -- you're  
10 talking about what's frivolous here is the -- was the  
11 litigation in California, okay. I don't think you're at this  
12 point suggesting that litigation that the trustee has yet to  
13 bring is frivolous because, obviously, the trustee has an  
14 attorney and Mr. Herbst's firm. Rule 11 exists in this Court.

15 MR. BALISOK: Right, Your Honor.

16 THE COURT: And presumably, if frivolous actions are  
17 brought, you can pursue or you can attempt to pursue the issue  
18 with respect to whether something is within rule 11 or not.  
19 But that's a different action.

20 MR. BALISOK: And I agree.

21 THE COURT: What Mr. Messer is trying to do is to make  
22 sure that he fulfills his duty as a trustee, and he has a duty  
23 to examine. And then if he finds anything for which he feels  
24 is a basis for bringing an avoidance action, he has a duty to  
25 bring that action. Okay, it's in the best interest of the



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1 estate to do that at the smallest cost, and the argument that  
2 he's making here is that Mr. Gershburg, you know, has -- had  
3 gone up that learning curve already because --

4 MR. BALISOK: Right. And Your Honor --

5 THE COURT: -- he has a lot of information, okay.  
6 What I need to have made clear here today is who is the client,  
7 and who is the attorney, and how many masters that attorney  
8 has; and how the client is going to be getting reports from the  
9 attorney, and how that's going to work so that it's very clear  
10 that what happened in California happened in California. And  
11 if you feel there's a cause of action, you'll be in touch with  
12 Mr. Messer, and Mr. Messer presumably will use his firm if he  
13 feels necessary to pursue that, to use Mr. Herbst's from who  
14 has been retained already.

15 But here we're talking about the right of a trustee to  
16 utilize a counsel who has sufficient information on the face of  
17 it again there's not an objection by another creditor. And in  
18 fact, there is an exception if we're talking about the  
19 representation was of a creditor so that's, I guess, what I'm  
20 trying to make clear here. I understand your concerns, but I  
21 think we have to be clear on what the retention being sought  
22 is. And that does not in any way take away from if you feel  
23 that there's an asset here that you contact Mr. Messer and you  
24 discuss it with him.

25 MR. BALISOK: We have, Your Honor, repeatedly, and I

IMAGE RENT A CAR, INC.

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1 sent him a copy of all motions I made. And that's why I was a  
2 little surprised by this application because it seems a little  
3 premature. He hasn't investigated the matter.

4 THE COURT: It's not premature. If it could -- he  
5 could have --

6 MR. BALISOK: He hasn't done anything yet, Your Honor.

7 THE COURT: He could have an avoidance action to be  
8 brought against the debtor here. That has nothing to do with  
9 whether the action in California is frivolous or not. It's  
10 going to be totally independent of that action. If there  
11 was -- if he has a reason, whether it's preference, or  
12 fraudulent conveyance, or unexplained assets, or missing  
13 assets, that's an -- those are his avoidance power actions.

14 MR. BALISOK: But he'll be hiring Digby Adler Group to  
15 whom he has a cause of action against.

16 THE COURT: Oh, no, he's not hiring Digby; he's hiring  
17 Mr. Gershburg's firm.

18 MR. BALISOK: Who works for Digby, Your Honor.

19 THE COURT: Well, that's what we're going to find  
20 out --

21 MR. BALISOK: Yes, Your Honor, okay.

22 THE COURT: -- right now.

23 MR. BALISOK: Passover was Saturday and Sunday, so I'm  
24 kind of a little behind the curve. I -- today is Passover,  
25 too, but I got exception to come and work. But -- so I'm going

## IMAGE RENT A CAR, INC.

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1 to try to do this. I would have done it in writing but because  
2 of the holiday, I do apologize.

3 THE COURT: You didn't do it. You did file a writing.

4 MR. BALISOK: There were some things alleged by the  
5 reply, and I just want to quickly, Your Honor. So --

6 THE COURT: Go ahead.

7 MR. BALISOK: Okay. So, in the application, the  
8 estate's claims, I've addressed that. If I could just quickly  
9 with leave of Court, Your Honor, Mr. Herbst has represented  
10 that I allege that the sole reason why Mr. Gershburt's  
11 retention should be denied should be solely due to his  
12 representation of the creditor. And that is incorrect, Your  
13 Honor. I stated in paragraph 39 explicitly that the reason why  
14 in addition to that fact is that Mr. Gershburt abused,  
15 harassed, intimidated. It didn't border, which what was Judge  
16 Rosenthal said: he really intimidated and attacked Mr.  
17 Zilberman. It was a bloodbath in there, Your Honor. He  
18 treated him like, frankly, the way you don't treat your enemy  
19 if you're thinking straight. Mr. Gershburt acted in a behavior  
20 that on paper was clearly egregious. I was there, Your Honor,  
21 and let me tell you every word that came out of Mr.  
22 Gershburt's -- Mr. Zilberman's mouth was -- and he was made fun  
23 of. It didn't end, Your Honor. It was horrible.

24 And then I went to the bathroom: Mr. Zilberman says  
25 I'm not feeling well; I'm going to throw up; I got high blood

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1 pressure; I'm not sure what I'm going to do. I told him we got  
2 to stay here. He calls me today: he says I'm still sick from  
3 it.

4 The reason why I'm trying to stop Mr. Gershburg which  
5 ironic is that Mr. Herbst is saying that Mr. Gershburg does not  
6 represent -- doesn't represent Digby Adler Group. Well, Your  
7 Honor, a lot of misinformation and you've been mislead in a  
8 large part here, and I'd like -- just like to clearly point it  
9 out. Mr. Gershburg has not done any litigation on the  
10 California matter. He's not admitted in California. He didn't  
11 litigate the matter in California. He was retained after the  
12 California matter was stayed by this bankruptcy court.

13 Mr. Gershburg perhaps has spent some time reading.  
14 The only thing he has done is the 2004 in which he attacked,  
15 disrespected, abused, and treated Mr. Zilberman in a truly  
16 unprofessional manner. Then after the Court told him you get  
17 one examination, four and a half hours of abuse wasn't enough:  
18 he wanted to come back and do it again. He gets in front of  
19 Judge Rosenthal, and Judge Rosenthal says to him, listen, did  
20 you or did you not do what Mr. Balisok said?

21 He says, no, I didn't. He lies, straight out lies to  
22 the Court.

23 THE COURT: I've made my -- I'm familiar with what --

24 MR. BALISOK: But then he calls me a liar, Your Honor.  
25 And then on top of it, he lies again. And then I get -- Your

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1 Honor, Mr. Gershburt's kind of is consistent -- the question,  
2 Your Honor, is should the trustee, who already has a perfectly  
3 good attorney, who I would be more than happy to work with -- I  
4 did not object -- should he then be allowed to have special  
5 counsel who's already proven that he doesn't care to lie to the  
6 Court, doesn't care to abuse the debtor, doesn't care --

7 THE COURT: I've heard enough. Okay, anything else?

8 MR. BALISOK: Yes, just a few more things, Your Honor.  
9 The record, Your Honor -- the record is quite clear. If you  
10 review the record, all of the information is contained therein.  
11 Judge Rosenthal was very clear: he said that Mr. Gershburt  
12 treated Mr. Zilberman exactly as I describe.

13 The question here is not a merely technical one; it's  
14 a question of equity, Your Honor. Out of all the attorneys in  
15 Brooklyn in mid and eastern district, whether or not Mr. --

16 THE COURT: Here's the problem: you have to figure  
17 out who your client is. You are representing the debtor; you  
18 are not representing the principal, is that correct? Or are  
19 you also being retained by the principal --

20 MR. BALISOK: I'm trying to --

21 THE COURT: -- to make this argument today?

22 MR. BALISOK: -- defend Mr. Zilberman from going  
23 though the terrible experience that he went through last time,  
24 Your Honor.

25 THE COURT: Who are you representing? Are you --

## IMAGE RENT A CAR, INC.

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1 MR. BALISOK: I represent Image Rent A Car, the  
2 debtor. Mr. Zilberman is a representative of the debtor.

3 THE COURT: But you're not representing --

4 MR. BALISOK: And he's the only represent --

5 THE COURT: -- him?

6 MR. BALISOK: No. And he's the only representative  
7 available, Your Honor. So what am I going to do? I called him  
8 up and I told him that the application was made. And he said  
9 to me, is this legal; can he do this to me again? I don't know  
10 how I'm going to get him back in the room.

11 THE COURT: Again, he's not -- we have to -- again --

12 MR. BALISOK: Mr. Gershburg cannot do his job without  
13 sitting down with Mr. Zilberman again at least for four hours.  
14 He spent those four hours abusing him.

15 THE COURT: You understand that the client now is the  
16 trustee?

17 MR. BALISOK: But the trustee, Your Honor, has good,  
18 perfectly good counsel. He could pick from anyone he wants. I  
19 called him, Your Honor. I said to him, "I can't get through to  
20 Mr. Herbst. I don't understand what's going on. Why are you  
21 picking Mr. Gershburg? Did you not read the order. Did you  
22 not read the transcript? Has anyone read anything? Has anyone  
23 seen what's going on?"

24 And he said to me I'll hire other -- what's it's  
25 called -- counsel.

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1 THE COURT: Let me hear from --

2 MR. BALISOK: Well, hire other counsel.

3 THE COURT: Let me hear from Mr. Gershburt, okay.

4 MR. BALISOK: Thank you, Your Honor.

5 THE COURT: Good morning, Mr. Gershburt.

6 MR. GERSHBURG: Good morning, Your Honor. Let me just  
7 be perfectly clear if I may. And just to echo most of what Mr.  
8 Herbst said, in terms of the representation, should we be  
9 appointed as special counsel, we will no longer be appointed as  
10 counsel to Digby Adler. In other words, we will not be  
11 retained by Digby Adler anymore.

12 THE COURT: But -- I understand that. But you are  
13 currently their attorney?

14 MR. GERSHBURG: That's correct.

15 THE COURT: Okay. Are they -- again, it's not a  
16 question of what you want to do. Are they prepared to release  
17 you?

18 MR. GERSHBURG: They are. And it's conversations that  
19 I've had with my client with respect to this. If we are, in  
20 fact, appointed special counsel, if the Court believes it's a  
21 conflict to do so, they're absolutely --

22 THE COURT: Oh, no, there's no question --

23 MR. GERSHBURG: Right.

24 THE COURT: -- that you need to be representing -- and  
25 I believe probably that would be Mr. Herbst's position, too,

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1 that you --

2 MR. GERSHBURG: Yes, Your Honor.

3 THE COURT: -- you're going --

4 MR. GERSHBURG: Yes, yes, Your Honor.

5 THE COURT: They need to be -- you need to -- yes.

6 MR. GERSHBURG: Yes, Your Honor.

7 THE COURT: Your client. And if that's not clear, it  
8 needs to be made clear that Digby -- and again, I don't know  
9 what the continued involvement would be in any event -- but  
10 that you could no longer be Digby's attorney. And again,  
11 that's up to Digby as well.

12 MR. GERSHBURG: We've had conversations. I've had a  
13 conversation with my client. They understand this and they're  
14 fine with this: if I am, in fact, appointed special counsel,  
15 we would no longer represent Digby.

16 THE COURT: That would be your former client --

17 MR. GERSHBURG: correct.

18 THE COURT: -- what -- if you're appointed?

19 MR. GERSHBURG: That is correct. That is correct.

20 Other than that, I don't want to get into a war of words. I  
21 will simply say on the record --

22 THE COURT: How much -- again, and maybe I was -- I  
23 misunderstood. How much information do you have, and how have  
24 you gotten it -- don't tell me what it is -- and gathered it  
25 such that you have this amount of knowledge, which is going to



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1 save the estate so much money other than the fact that you  
2 apparently work more cheaply than --

3 MR. GERSHBURG: Correct.

4 THE COURT: -- Mr. Herbst does.

5 MR. GERSHBURG: For a period of time. I will say that  
6 because of the California litigation, which I've never  
7 represented I've been involved, in which I'm not involved in --

8 THE COURT: My misunderstanding.

9 MR. GERSHBURG: Right. We have received documentation  
10 from the California attorneys as well as, without going into  
11 specifics, we've been contacted by several people that are  
12 intimately involved with this matter with respect to the  
13 debtors, who provided us certain pieces of information about  
14 the way the debtor has conducted their business, about certain  
15 transfers that occurred prior, about certain personal  
16 relationships that occurred. There were affidavits that were  
17 filed with the California court that completely contradict, and  
18 this was brought up in the 2004 examination as well as the 341  
19 examination, what the debtors now represent, the debtor  
20 corporation. So they are several people that have reached out  
21 to us with respect to that as well as documentation that we've  
22 received from counsel, from Digby's counsel in California with  
23 respect to this. We've also done our own research, we've --  
24 I'm a little handcuffed here in that I can't go into details --  
25 but to see whether or not the corporation is still actively

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1 doing business on our own through our own expenses, which the  
2 trustee did not do at the present time. We took it upon  
3 ourselves because we felt so strongly in our position that  
4 there was, in fact, fraudulent conveyances here; that there  
5 was, in fact, business that is ongoing. So without again  
6 going into specifics, we have several pieces of information  
7 from various sources and from going through the bank records  
8 and from going through the documentation that was provided,  
9 we've sort of taken a snapshot and done a really detailed  
10 snapshot, I should, as to how the debtor conducted their  
11 business over the previous five years -- or four years, I  
12 should say.

13 THE COURT: How long have you been involved in the  
14 matter?

15 MR. GERSHBURG: A little over, I would say, probably,  
16 six months to a year, Your Honor, from the beginning of it, I  
17 would say around that period of time. But within that, my  
18 client --

19 MR. GERSHBURG: And have you been paid throughout?

20 MR. GERSHBURG: I have, Your Honor.

21 THE COURT: Okay. Do you understand that you're not  
22 going to be paid anymore?

23 MR. GERSHBURG: I do, Your Honor. I do.

24 THE COURT: And that whatever -- again, whatever  
25 application for allowance is dependent upon there being an

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1 estate here, and that that application is a very, very detailed  
2 application for allowance that you'd have to make here and that  
3 I would have to approve?

4 MR. GERSHBURG: I feel very strongly in my position  
5 that certain occurrences took place in this action dealing with  
6 avoidance and dealing with fraudulent conveyances that I'm  
7 absolutely prepared to take that chance, if you will, Your  
8 Honor, yes.

9 THE COURT: Okay. And that you're -- and that the  
10 Digby entity can no longer be paying you?

11 MR. GERSHBURG: That's correct.

12 THE COURT: They -- you will no longer have a  
13 attorney-client relationship with them, is that made clear to  
14 them?

15 MR. GERSHBURG: Yes, Your Honor.

16 THE COURT: Okay. Mr. Herbst, has there been any  
17 discussion with how you're going to be monitoring this  
18 retention? I'm going to ask you, Mr. Herbst, to come back to  
19 the podium.

20 MR. HERBST: Yes, Your Honor, we haven't had a  
21 detailed discussion on this, but I will be -- I and one of my  
22 associates, Jordan Pilevsky, will be --

23 THE COURT: Well, actually, it should be the trustee.  
24 I mean I guess that's -- let's be clear about this because  
25 otherwise to the extent that we have a client here, the client

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1 is the trustee, and I don't -- what we don't want to do is have  
2 two levels of legal work.

3 MR. HERBST: That's quite fair, Your Honor. And I  
4 certainly -- to make it clear, Your Honor won't see if there is  
5 an estate duplicative billing records. Your Honor will not see  
6 that. The only thing Your Honor will see is one firm billing  
7 for one cause. That's what you'll see. So I'll make clear to  
8 the extent that I have any communications just as I believe  
9 it's necessary in the context of my representation, you won't  
10 see a duplicate billing of my firm and what special counsel is  
11 doing.

12 But I -- what I would -- what I anticipate is there  
13 will be regular conversations, regular status reports by  
14 special counsel in contacting the trustee with regard to his  
15 recommendations and whether the trustee will make a  
16 determination in his business judgment as to what actions  
17 should be brought -- so -- and not by me; I'm talking about by  
18 special counsel we'll have those communications and provide  
19 regular status reports.

20 As far location of the two -- any depositions, to  
21 avoid the argument that I heard today, it would seem to be that  
22 the trustee has a conference room, and those can be conducted  
23 in the trustee's conference room as far any examinations that  
24 take place. So that would avoid, I'm sure, any question or  
25 concern that has been raised today with regard to the

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1 professionalism, or the disrespect, or things of that nature.

2 I hope that addresses Your Honor's question.

3 THE COURT: In part, it does. I would want to see  
4 that -- Mr. Gershburt, is it individual or are you with a firm?

5 MR. GERSHBURG: It's my own firm, Your Honor.

6 THE COURT: Law offices of Daniel Gershburt?

7 MR. GERSHBURG: Law -- Daniel Gershburt, Esq., P.C.,  
8 yes.

9 THE COURT: I would want there to be written monthly  
10 reports to the trustee. I mean what I'm trying to do here, Mr.  
11 Balisok, is to alleviate the concerns and the issues that you  
12 have. I know you feel very strongly about them and so does  
13 your client, but what I'm trying to do is to allow the  
14 retention. Again, and I'm not going to sign an order until I  
15 see a letter from your client releasing you and making clear  
16 that there is no longer an attorney-client relationship, and  
17 there will be no compensation from them to you; as well as an  
18 affidavit from you. I'm not going to do -- I'm not going to  
19 sign an order until I see both the statement from the attorney  
20 and your affidavit as to that effect.

21 I want to see monthly written reports to the trustee.  
22 I take Mr. Herbst's suggestion: I think it's a good one, that  
23 the -- any further examinations occur in the trustee's offices.  
24 And if the trustee can make himself available, even better.  
25 I'm not going to require that. I can't tell him how to operate

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1 as a trustee.

2 Let me just double check as long as I see you're here;  
3 Ms. Martin, does the U.S. Trustee's Office taken any position  
4 on this?

5 MS. MARTIN: Your Honor -- I'm sorry. Marylou Martin  
6 representing the United States Trustee, Your Honor, I believe I  
7 did sign off on this particular retention order. Yeah, I --

8 THE COURT: Okay.

9 MS. MARTIN: We didn't feel that there was any issues  
10 with regard to a 327(e) retention this case. We didn't believe  
11 that Mr. Gershburt represented an adverse interest to the  
12 estate.

13 THE COURT: Okay. And that's important, Mr. Balisok,  
14 because that's what -- that's their job, too. So I'm -- again,  
15 I'm going to allow the retention, pending my receiving, again,  
16 a letter making it absolutely clear from your client that there  
17 is been released or is not an attorney-client relationship that  
18 will be continued and there's no compensation that you're going  
19 to be paid from him or any other source other than this estate;  
20 and upon receiving those documents as well as being made clear  
21 in the proposed order that they're going to be monthly reports  
22 to the trustee.

23 And again, the Court is here if, in fact, we're  
24 needed. Hopefully, it will go smoothly, and we will not be  
25 needed. But the kinds of things that you are being retained to

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1 do are to do -- to examine with respect to the trustee's  
2 avoidance powers, okay, and rule 11 applies. And again, the  
3 trustee -- and it seems to me you shouldn't be chasing your  
4 tail if after an examination you determine there's nothing to  
5 pursue. And if you determine there is something to pursue,  
6 then you should pursue it.

7 MR. GERSHBURG: Yes.

8 THE COURT: That's my ruling.

9 MR. GERSHBURG: Thank you, Your Honor.

10 MR. HERBST: Thank you, Your Honor.

11 THE COURT: Thank you.

12 MR. BALISOK: Thank you, Your Honor.

13 THE COURT: So it's granted subject to my receiving  
14 those documents.

15 MR. HERBST: I'll submit an amended order, Your Honor,  
16 if that --

17 THE COURT: Which, again, I will hold up on until I  
18 receive the documents from --

19 MR. HERBST: Yes, Your Honor.

20 THE COURT: Thank you.

21 THE CLERK: Just wanted tell you the order that I  
22 checked did not have a UST signature. So if he's going to  
23 submit an amended order, you should make sure it has --

24 THE COURT: Ms. Martin, we did not see a UST  
25 signature on the proposed order.

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1 Can you run that proposed -- give the new proposed  
2 order to Ms. Martin, so she can sign off, please?

3 MR. HERBST: Certainly, Your Honor.

4 THE COURT: It may -- again, it may have just been the  
5 copy we have. Thank you.

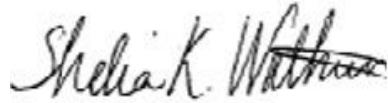
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C E R T I F I C A T I O N

I, Shelia Watkins, certify that the foregoing transcript is a true and accurate record of the proceedings.



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SHELIA WATKINS

AAERT Certified Electronic Transcriber CET\*\*D 645

eScribers

700 West 192nd Street, Suite #607

New York, NY 10040

Date: April 17, 2012

In the Matter of:  
IMAGE RENT A CAR, INC.Case No. 11-42390-nhl  
April 10, 2012

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**In the Matter of:**  
**IMAGE RENT A CAR, INC.**

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